

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
O'Connell, P.J., Markey and Talbot, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGEL HERNANDEZ-GARCIA,

Defendant-Appellant.

Supreme Court No. 129038

Court of Appeals No. 252516

Kent Circuit Court

No. 02-000104-FH

BRIEF OF ATTORNEY GENERAL AS AMICUS CURIAE

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Brad H. Beaver (P48649)
Assistant Attorney General
Department of Attorney General
Appellate Division
P.O. Box 30217
Lansing, MI 48909
Telephone: (517) 373-4875

Dated: April 14, 2006

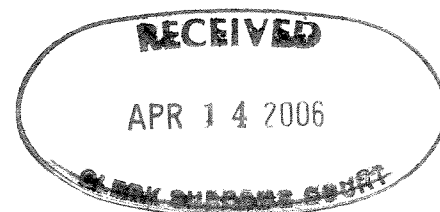


Table of Contents

	<u>Page</u>
Index of Authorities	ii
Counter-Statement of Basis of Jurisdiction of the Court of Appeals	iv
Questions Presented for Review	v
Counter-Statement of Facts	1
Argument.....	2
I. A penal statute must be construed according to its plain language. The plain language of the CCW statute requires only that the perpetrator have the intent to carry and conceal a pistol on his person irrespective of his purpose for doing so. There is no room in the language of the CCW statute to include an element that the perpetrator must act with some further criminal purpose in so concealing the pistol. No so-called innocent momentary possession defense can be derived from the language of the statute.	2
A. Introduction.	2
B. The plain language of the CCW statute yields a general intent crime.	3
C. <i>People v Tombs</i> does not support the judicial creation of new defenses or elements to a penal statute based on the perceived purpose of a statute.	5
D. The CCW statute's use of the simple term "conceal" differentiates it from <i>Tombs</i> where the more subtle concept of "distribute" was at issue.	7
E. There is no temporary innocent possession defense to the crime of carrying a concealed weapon.	9
II. Unless the plain language of a penal statute indicates otherwise, established common law defenses apply to it. The CCW statute does not indicate any legislative intent to exclude common law defenses such as duress or necessity. Accordingly, when a person is compelled to conceal a pistol on his person to avoid a greater harm, he may properly raise the common law defense of duress or necessity. This defense is more limited in scope than the so-called innocent momentary possession defense.	11
Conclusion and Relief Sought.....	14

Index of Authorities

	<u>Page</u>
Cases	
<i>American Heritage College Dictionary</i> , (3rd Ed 1997)	4
<i>In re Lamphere</i> , 61 Mich 105; 27 NW 882 (1886)	9
<i>People v Coffey</i> , 153 Mich App 311; 395 NW2d 250 (1986)	3, 9
<i>People v Hocquard</i> , 64 Mich App 331; 236 NW2d 72 (1975)	11, 12
<i>People v Kimble</i> , 470 Mich 305; 684 NW2d 669 (2004)	3
<i>People v Langworthy</i> , 416 Mich 630; 331 NW2d 171 (1982)	4
<i>People v Luther</i> , 394 Mich 619; 232 NW2d 184 (1975)	12
<i>People v Maffett</i> , 464 Mich 878 n 20; 633 NW2d 339 (2001) (J Corrigan, dissenting)	9
<i>People v McIntire</i> , 461 Mich 147; 599 NW2d 102 (1999)	9
<i>People v McKinney</i> , 258 Mich App 157; 670 NW2d 254 (2003)	13
<i>People v Merhige</i> , 212 Mich 601; 180 NW 418 (1920)	11
<i>People v Quinn</i> , 440 Mich 178; 487 NW2d 194 (1992)	4
<i>People v Rice</i> , 161 Mich 657; 126 NW 981 (1910)	4
<i>People v Shaefer</i> , 473 Mich 418; 703 NW2d 774 (2005)	3
<i>People v Tombs</i> , 472 Mich 446; 697 NW2d 494 (2005)	5, 6, 7

<i>People v Williamson</i> , 200 Mich 342; 166 NW 917 (1918).....	11
<i>People v Taylor</i> , 422 Mich 554; 375 NW2d 1 (1985).....	5
Statutes	
MCL 750.227	3
MCL 750.145c(3).....	5
MCL 750.227	3
MCL 750.227(2).....	2
MCL 750.83	4
Other Authorities	
1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 614-615	12
CJI2d 7.6, commentary.	12

Counter-Statement of Basis of Jurisdiction of the Court of Appeals

The People accept defendant's statement of appellate jurisdiction as accurate and complete.

Questions Presented for Review

- I. A penal statute must be construed according to its plain language. The plain language of the CCW statute requires only that the perpetrator have the intent to carry and conceal a pistol on his person irrespective of his purpose for doing so. Is there language in the CCW statute that allows for the creation of a so-called innocent momentary possession defense that would effectively require an additional element of criminal purpose beyond the general intent described in the statute?
- II. Unless the plain language of a penal statute indicates otherwise, established common law defenses apply to it. The CCW statute does not indicate any legislative intent to exclude common law defenses such as duress or necessity. Accordingly, when a person is compelled to conceal a pistol on his person to avoid a greater harm, may he properly raise the common law defenses of duress or necessity?

Counter-Statement of Facts

Amicus joins in the counter-statement of facts of the Appellee, the People of the State of Michigan.

Argument

- I. **A penal statute must be construed according to its plain language. The plain language of the CCW statute requires only that the perpetrator have the intent to carry and conceal a pistol on his person irrespective of his purpose for doing so. There is no room in the language of the CCW statute to include an element that the perpetrator must act with some further criminal purpose in so concealing the pistol. No so-called innocent momentary possession defense can be derived from the language of the statute.**

A. **Introduction.**

The issue before the court is whether MCL 750.227(2) should be interpreted to include a momentary innocent possession defense. It should not. The plain language of the statute only requires that a perpetrator act with a general intent for the elements of the offense to be met: that he intends to carry and conceal a pistol. There is no statutory requirement that the perpetrator have any further criminal purpose in mind to be guilty of the offense. Nor is there any exception that the intent to deliver the weapon to authorities acts as a defense.

This does not mean that a person who innocently conceals a pistol is guilty of the offense irrespective of the circumstances of the case. Common-law defenses such as duress and necessity can be raised with respect to this crime. Thus, where a person is forced to conceal a pistol on his person to avoid a greater harm to himself or others, he may have satisfied the elements of the offense, but at the same time, he can properly raise this claim in light of applicable common-law defenses.

The distinction between creating a "momentary innocent possession" defense and simply applying the already established doctrines of necessity and duress to the offense is an important one. Momentary innocent possession, as described by the Court of Appeals, would give a criminal defendant rights greater than he would have under the established common-law doctrines. It would allow a person to legally conceal a pistol on his person even when doing so was unnecessary so long as he had the intention of delivering it to the authorities. Even if such a

broad expansion of the doctrine of necessity were good policy, it would be the business of the Legislature to create such a defense and not the courts.

It was error for the Court of Appeals in *People v Coffey*, 153 Mich App 311, 314; 395 NW2d 250 (1986), to divine a momentary innocent possession defense from the purported purpose of the statute. Rather, and as the Court of Appeals panel in this case correctly determined, a momentary innocent possession defense is not authorized by the language of the statute.

Because defendant was not entitled to a momentary innocent possession instruction and because he did not request a necessity or duress instruction, the decision of the Court of Appeals should be affirmed.

B. The plain language of the CCW statute yields a general intent crime.

The intent of the Legislature as expressed by the language used in the statute governs the interpretation given to it by this Court. It is presumed that the Legislature intended the meaning it expressed in the language of a statute. Therefore, where the language of a statute is unambiguous, it must be enforced as written.¹ Questions of statutory interpretation are reviewed de novo.²

The language of MCL 750.227 (the CCW statute) clearly and unambiguously creates a general intent crime requiring nothing more of a perpetrator than the intent to carry and conceal a pistol. It does not require the perpetrator to have any further criminal purpose in mind for its commission. Nor does the clear language of the statute excuse a person because he intends to deliver the weapon to the authorities.

MCL 750.227 states in relevant part:

¹ *People v Shaefer*, 473 Mich 418, 430-431; 703 NW2d 774 (2005).

² *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

(2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

(3) A person who violates this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than \$2,500.00.

In order to determine the required mental state for a crime, this Court first examines the statute itself and seeks to determine the Legislature's intent.³ Criminal intent is ordinarily an element of a crime even where the crime is created by statute.⁴

The CCW statute does not explicitly indicate what state of mind a perpetrator must possess. But the statute uses the terms "carry" and "conceal." The ordinary meaning of these two terms require a knowing action. To "carry" means "to hold or support while moving; to bear." And to "conceal" means "to keep from being seen, found, or observed; to hide."⁵ One does not think in ordinary circumstances of a person carrying and concealing an object without intent or knowledge. Both terms, in their ordinary sense, presuppose a knowing action.

Beyond these two terms, the language of the CCW statute does not contemplate any further specific criminal purpose. That is, the language of the CCW statute does not create a so-called specific intent crime. A specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself.⁶ When a statute contains a specific intent requirement, it does so explicitly. For example, MCL 750.83 creates a possible life offense for someone to assault another with the intent to murder the victim. The language of the statute unambiguously includes language regarding a specific intent

³ *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992).

⁴ *People v Rice*, 161 Mich 657, 664; 126 NW 981 (1910).

⁵ *American Heritage College Dictionary*, (3rd Ed 1997).

⁶ *People v Langworthy*, 416 Mich 630, 639, 644; 331 NW2d 171 (1982).

requirement: "Any person who shall assault another *with intent to commit the crime of murder*. . . ." (emphasis added). The inclusion of the specific intent language creates a requirement that the perpetrator have a certain purpose in mind other than the commission of the act itself.⁷ The CCW statute has no such language. It only requires that a pistol be carried and concealed and says nothing about the purpose for which it so carried or concealed.

C. *People v Tombs* does not support the judicial creation of new defenses or elements to a penal statute based on the perceived purpose of a statute.

Defendant argues on appeal that *People v Tombs*⁸ is an exception to the principle that specific intent requirements must be found in the language of the statute itself. But even in *Tombs*, this Court found an intent requirement based on its interpretation of the meaning of the term "distribute" and "promote," and not based on an inferred purpose standing behind the statute.

Tombs involved the crime of distribution of child sexually abusive material under MCL 750.145c(3). The statute prohibits the "distribut[ion] or promot[ion of]. . . any child sexually abusive material." The majority in *Tombs* found that: "to convict a defendant of distribution or promotion under MCL 750.145c(3), the prosecution must prove that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent."⁹

At first glance, it would seem that by the inclusion of the third enumerated requirement the *Tombs* majority interpreted MCL 750.145c(3) to include criminal purpose as an additional element without support from the language of the statute itself. That is, not only does the

⁷ *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985).

⁸ *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005).

⁹ *Tombs*, 472 Mich at 465.

perpetrator need to intent to distribute the prohibited material, but he also must do so for some further criminal purpose.

But examining the facts of *Tombs* reveals that the Court did not read into the statute such an additional requirement. Rather, it viewed the terms "distribute" and "promote" in a specific way that required this additional element. The additional criminal intent referred to in the third element is the intent to have the recipient become aware that he received the prohibited materials. That is, the Court found that an intent to transfer includes not only an intent to deliver an object containing the prohibited materials, but also an intention that the recipient know that he is receiving child sexually abusive material.

In its discussion of the insufficiency-of-the-evidence claim, the *Tombs* majority described why the evidence was insufficient to satisfy this specific intent element¹⁰:

Although defendant intended to distribute the laptop containing child sexually abusive material to his former employer, no evidence suggests that he distributed the material with a criminal intent. There was no evidence that defendant made anyone at Comcast aware, or attempted to make anyone aware, of the presence of the material. To the contrary, there is evidence that defendant neither intended nor expected anyone at Comcast to discover or view the material.

Comcast witnesses acknowledged that the computer hard drive could be erased and reformatted without any of its files being reviewed. Mr. Williams admitted that this was the practice at Comcast and that defendant himself may have previously performed such erasures on returned computers.

Williams admitted that he looked through defendant's files because "I just wanted to see what was on there," not because it was necessary. Williams further testified that he did not tell defendant when he arranged to pick up the computer that he intended to look at any of his files. Another witness testified that the practice at Comcast was simply to wipe the hard drives of all information and reformat them.

From the testimony, one could reasonably conclude that defendant anticipated that no one at Comcast would review his files. His statement to FIA investigators was that he thought the entire hard drive would be merely erased and

¹⁰ *Tombs*, 472 Mich at 459-460.

reformatted. Viewed most favorably to the prosecution, the record contains nothing from which to reasonably infer that defendant intentionally left the material on the laptop for Comcast's employees to discover.

That is, the Court found that while there was evidence that the defendant intentionally delivered a computer that he knew contained prohibited material, he did not intend to distribute the prohibited materials themselves, as the evidence showed that he thought they would be erased before being viewed. Essentially, the Court found that "distribute" contemplates a transfer of materials in a manner in which the recipient knows what he is receiving. This is the "criminal intent" that the majority referred to in its third enumerated list of elements. Indeed, earlier in its opinion the Court interpreted the term distribute used in the statute as contemplating a knowing and intentional act.¹¹

Tombs, despite the use of the open-ended language "criminal intent" when it discussed the elements of the offense, therefore, did not add an element of specific intent derived from outside the language of the statute. Rather, it read the term "distribute" in the statute to require an intent for the defendant to have the prohibited materials themselves be received by the recipient.

D. The CCW statute's use of the simple term "conceal" differentiates it from *Tombs* where the more subtle concept of "distribute" was at issue.

The difference between the CCW statute and the statute at issue in *Tombs* arises from this subtle definition this Court gave to the term "distribute." The majority in *Tombs* found that the term implied an intent to communicate the prohibited material rather than just convey the material in which the prohibited material was stored. The three-Justice dissent in *Tombs*, on the other hand, would have employed this more general definition to the term.¹²

¹¹ *Tombs*, 472 Mich at 457.

¹² *Tombs*, 472 Mich at 475.

The concepts in the CCW statute, "carry" and "conceal," on the other hand, do not operate in the same way. When an item is carried and concealed, a single person with a single mental state is involved. He either intends to carry and conceal a weapon or he does not. The parallel situation to *Tombs*, would be where a person has a pistol in a box, and then he merely intends to conceal the box on his person. But in such a case by putting the pistol in the box and carrying it, he has already intended to conceal it. A pistol stored in a box is already hidden from view. When the person goes on to conceal the box on his person, knowing the pistol is inside, he has concealed the pistol even further.

The concept of "distribute" as understood by this Court is not amenable to the same analysis. One may intend to distribute a box without the intent of distributing the gun hidden inside. If for example one delivers the box to a junkyard with the belief that it will be destroyed, he does not intend to distribute the gun. An act of concealment is completed immediately when it is performed. An act of concealment results in a completed concealment irrespective of the purpose of the action.

Accordingly, it is the nature of the concept of "concealment" that precludes the Court from reaching the same result in this case as it did in *Tombs*. Here, the language of the CCW statute only requires a general intent to carry and conceal a weapon. It says nothing about any additional criminal intent, and nothing about the terms "carry" or "conceal" require any further criminal purpose.

E. There is no temporary innocent possession defense to the crime of carrying a concealed weapon.

In *Coffey*, the Court of Appeals divined a temporary innocent possession defense from the CCW statute based largely on the perceived purpose behind the statute.¹³ It read additional meaning into the term "conceal" to imply an additional criminal purpose.

But that is not a valid reason for creating a new defense. Where a conflict exists between the plain language of a statute and the Court's perception of what the Legislature must have intended despite such language, the Court must apply the statute as written.¹⁴ "Whatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by Legislation."¹⁵ Again, *Tombs* does not stand against this principle; it determined there was a criminal purpose element based on its interpretation of the words of the statute.

The intention of the Legislature as expressed by its words in the CCW statute was to criminalize the carrying and concealment of weapons. The statute contains exceptions for those who have a license to conceal weapons, and for those who do so in their house, place of business, or other property. It says nothing about an additional exception for persons intending to turn the weapon over to authorities. The *Coffey* Court erred in creating a new exception not supported by the language of the statute. Creating a new exception is for the Legislature.

As indicated in Issue II, the exclusion of a temporary innocent possession defense does not reflect an unwise policy choice. This is because common-law defenses such as necessity and

¹³ *People v Coffey*, 153 Mich App 311, 314-315; 395 NW2d 250 (1986).

¹⁴ *People v McIntire*, 461 Mich 147, 155-159; 599 NW2d 102 (1999).

¹⁵ *People v Maffett*, 464 Mich 878, 897 n 20; 633 NW2d 339 (2001) (J Corrigan, dissenting), quoting *In re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886).

duress already afford protection for people whose violation of the CCW statute should be otherwise excused.

II. Unless the plain language of a penal statute indicates otherwise, established common law defenses apply to it. The CCW statute does not indicate any legislative intent to exclude common law defenses such as duress or necessity. Accordingly, when a person is compelled to conceal a pistol on his person to avoid a greater harm, he may properly raise the common law defense of duress or necessity. This defense is more limited in scope than the so-called innocent momentary possession defense.

The fact that no specific intent can be read into the CCW statute does not mean that truly innocent or excusable conduct will result in a criminal conviction. Where a person is forced by another person or by circumstances to conceal a pistol on his person to avoid a greater harm, common law defenses apply to his conduct.

In fact, the defenses of necessity and duress have long been recognized as defenses to the crime of carrying a concealed weapon in Michigan. In *People v Williamson*¹⁶, this Court found "[w]hile there is a diversity of holdings in the different States, depending largely upon varying local statutes, the great weight of authority is to the effect that the intent, or purpose with which the weapon is carried, is not an element of the statutory offense. *Of course, if the weapon was carried upon his person through restraint or ignorance, that would be a good defense to the prosecution.*" (emphasis added).

There are several terms that have been used to denote defenses based on the concept of restraint or compulsion, most commonly "duress," "necessity," "coercion," and "compulsion." The defense of compulsion was recognized in Michigan in *People v Merhige*.¹⁷ Necessity and duress are both specific applications of the compulsion defense, and so applying either to the crime of carrying a concealed weapon would not amount to the recognition of a new defense in Michigan.¹⁸

¹⁶ *People v Williamson*, 200 Mich 342, 346; 166 NW 917 (1918).

¹⁷ *People v Merhige*, 212 Mich 601; 180 NW 418 (1920).

¹⁸ *People v Hocquard*, 64 Mich App 331, 338; 236 NW2d 72 (1975).

Duress is a common-law affirmative defense applicable in situations where the crime committed avoids a greater harm threatened by another person. The reasons underlying the defense are clear ¹⁹:

The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person.

In order to properly raise the defense, the defendant has the burden of producing "some evidence from which the jury can conclude that the essential elements of duress are present."²⁰

The elements of duress require the defendant to show:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm.²¹

The only difference between the defenses of duress and necessity is that the source of compulsion for duress is the threatened conduct of another human being, while the source of compulsion for necessity is the presence of natural physical forces.²²

Clearly, these defenses have a more limited application than the so-called momentary innocent possession defense that the *Coffey* court read into the statute. Under the momentary-possession defense, a defendant need not have been faced with conduct that would have put a reasonable person in fear of death or serious bodily harm. Nor would he have to have in fact

¹⁹ 1 LaFave & Scott, Substantive Criminal Law, § 5.3, pp 614-615.

²⁰ CJI2d 7.6, commentary.

²¹ *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975).

²² *Hocquard*, 64 Mich App at 337 n 3.

been in fear. Nor would he have been forced to conceal the weapon to avoid the harm. Rather, it is simply enough that the person took the weapon away from an unlawful possessor and is concealing it with the intention of delivering it to the police. In other words, *Coffey* purported to create a defense that restricted the coverage of the CCW statute more than the applicable common-law defenses do, and more than the Legislature intended.

In the present case, defendant did not request a necessity or duress defense, nor would he have been entitled to one. Defendant did not testify that fear for his life or fear of great bodily harm caused him to *conceal* the pistol. While he did testify that he was afraid the men he took the pistol from may come after him, (11-12b), that did not necessarily give him a reason to conceal the gun on his person. In fact, when the defendant was ultimately approached by the policeman, these other men were nowhere to be seen. (2-5b).

Thus, the record of this case demonstrates the inadequacy of the judicially created momentary possession defense. While circumstances of necessity or duress may excuse a person for disarming an unlawful possessor of a pistol, they will not necessarily excuse the action of concealing it afterwards. That is, the defense created by *Coffey* is not merely a specific application of duress and necessity; it is the judicial creation of a broader defense that is not supported by common-law or the language of the CCW statute.

Here, there was no evidence offered to support the defense that it was necessary for defendant to conceal the pistol after he eluded the mysterious men. Therefore, even had defendant requested such a defense instruction, the trial court could have properly refused to give it.²³ Accordingly, the Court of Appeals correctly determined that defendant was not entitled to an instruction consistent with *Coffey*.

²³ *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003).

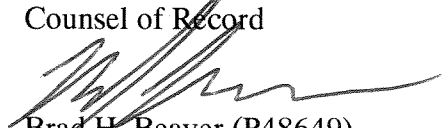
Conclusion and Relief Sought

The Court of Appeals correctly determined that there is no momentary innocent possession defense to the crime of carrying a concealed weapon. This Court should therefore affirm the decision below and overrule the Court of Appeals decision in *Coffey*.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record



Brad H. Beaver (P48649)
Assistant Attorney General
Attorneys for Amicus Curiae
P.O. Box 30217
Lansing, MI 48909

Dated: April 14, 2006
2006000356B/Hernandez-Garcia Amicus Brief